APPENDIX A

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF VIRGINIA

NORFOLK DIVISION

SYLVESTER LAWRENCE,

Plaintiff,

v.

Civil Action No. 3436

NORFOLK DREDGING CO., INC.,

Defendant.

MEMORANDUM

Plaintiff, employed as a deckhand on defendant's dredge TALCOTT, was injured on September 3, 1957, while the dredge was in navigable waters at Oregon Inlet, near Manteo, North Carolina, when an anchor was allegedly dropped on his leg. Without the benefit of an award, plaintiff was paid the sum of $4,466.55 over a period of nineteen months and defendant further expended $6,196.64 by way of medical expense, all pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

On March 17, 1960, this action was instituted under the Jones Act, 46 U.S.C. § 688, in the United States Dis-

trict Court for the District of Columbia which, after certain preliminary proceedings, transferred the case to this Court. Defendant has now filed a motion to dismiss alleging that plaintiff elected to claim and receive the benefits of the Longshoremen's and Harbor Workers' Compensation Act and hence cannot now seek another remedy. There is no contention that plaintiff was not aware of his right, and we are met with the single issue as to whether a "seaman," having elected to receive and accept the benefits of the Longshoremen's and Harbor Workers' Compensation Act, is thereby precluded from maintaining his action under the Jones Act. Stated otherwise, where the status of one aboard a vessel in navigable waters may be in serious dispute, does the election of one remedy foreclose recourse in another channel?

For the sole purpose of defendant's motion to dismiss, it is conceded that plaintiff occupies the technical status of "seaman." Arguing that cases arising under the "twilight zone" doctrine should preclude a possible remedy under the Jones Act, defendant seeks to invoke the principles established in *Davis v. Department of Labor*, 317 U. S. 249, and *Hahn v. Ross Island Sand & Gravel Co.*, 358 U. S. 272. The difficulty with this contention is revealed in *Norton v. Warner Co.*, 321 U. S. 565, 569, footnote 3, where the Supreme Court limited the effect of the *Davis* case to problems involving state compensation acts and the Longshoremen's and Harbor Workers' Act. As suggested in *Norton*, we have, in the present case, two mutually exclusive federal systems where the risk of choosing the wrong remedy has been anticipated by Congress and at least partially avoided. As Justice Douglas points out, to permit an award to stand "there would be brought within the Act a group of workers whom we do not believe Congress intended to included," and "where

Congress has provided that those basic rights (Jones Act, unseaworthiness, maintenance and cure) shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise."

In *Grimes v. Raymond Concrete Pile Co.*, 356 U. S. 252, an action was instituted under the Jones Act for injuries suffered while being transferred at sea in a "Navy life ring" from a tug to a Texas Tower in process of construction. The employer urged that plaintiff's exclusive remedy was under the Defense Bases Act, 42 U.S.C. § 1651-1654, which incorporates the remedies of the Longshoremen's and Harbor Workers' Act. The Supreme Court, noting that the Defense Bases Act does not apply in respect to the injury or death of "a master of member of a crew of any vessel," held that a jury question was presented as to the status of the injured employee. The dissenting opinion agreed that the Defense Bases Act does not foreclose "seamen" from having recourse to the Jones Act and, in *Grimes*, the record disclosed that the injured employee had collected compensation under the Defense Bases Act. As the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902, specifically defines an "employee" as not including "a master or member of a crew of any vessel," it is, in the opinion of this Court, impossible to reconcile the *Norton* and *Grimes* cases with the position now advanced by the defendant.

The authorities relied upon by the defendant deal, in the main, with conflicts arising under the "twilight zone" doctrine by reason of state and federal conflicts. Only in *Outts v. A. P. Ward & Son, Inc.*, N. D. Fla., 146 F. Supp.

733, and *Flores v. Frann,* D. C. P. R., 175 F. Supp. 140, have questions of election by seamen been presented. In *Ousts,* the Court merely held that, in any event, plaintiff would receive more under the compensation act then he would be entitled to under the general maritime law, and that no proof of negligence had been shown. The *Flores* case concluded that the Jones Act did not apply to the local waters of Puerto Rico and the Puerto Rican statute was on the same level as the Longshoremen's and Harbor Workers' Act. In affirming *Flores,* 282 F. (2d) 153, the First Circuit did not consider the election theory as advanced by the district court.

The holding in this case does no violence to the rights of the defendant. If it should be hereafter determined that plaintiff was a "harbor worker" covered under the Longshoremen's and Harbor Workers' Compensation Act, the amounts thus far expended would be no more than what defendant was legally entitled to in any event. If the plaintiff is successful in establishing that he was a "member of a crew" and hence entitled to sue under the Jones Act, and if he subsequently obtains a verdict in his favor, there is no problem of double recovery as the amounts received under the Longshoremen's and Harbor Workers' Act may properly be deducted from the verdict awarded him under the Jones Act. *Gahagan Const. Corporation v. Armco,* 1 Cir., 165 F. (2d) 301, cert. den. 333 U. S. 876. If plaintiff was a "member of a crew," he would ordinarily be entitled to maintenance and cure at the expense of the defendant. Presumably cure to the point of maximum recovery has already been paid by defendant. With respect to compensation benefits at the rate of $54.00 per week, these payments may be considered along with such items of maintenance, if any, which may have been due to plaintiff as a "member of a crew" in outpatient status. Since

maintenance and cure would be due to a "seaman," irrespective of any showing of negligence, it is unlikely that the defendant can be seriously prejudiced by now permitting the Jones Act proceeding to go forward.

Without expressly holding that plaintiff was a "member of a crew," the defendant's motion to dismiss will be denied.

Present order on notice.

United States District Judge

Norfolk, Virginia
June 5, 1961

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8914.

SYLVESTER LAWRENCE,

Appellee,

versus

NORFOLK DREDGING COMPANY, a Virginia corporation,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued March 29, 1963. Decided July 16, 1963.)

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and PREYER, District Judge.

Francis N. Crenshaw and Guilford D. Ware (Baird, Crenshaw & Ware on brief) for Appellant, and Wilfred R. Lorry (Sidney H. Kelsey, Abraham E. Freedman, Charles Sovel, and Freeman, Landy and Lorry on brief) for Appellee.

BOREMAN, Circuit Judge:

This case was instituted by Sylvester Lawrence, plaintiff, under the provisions of the Jones Act (46 U.S.C. § 688)[1] to recover damages for personal injuries sustained by him in an accident. The jury rendered its verdict in favor of the plaintiff in the amount of $100,000 and judgment thereon was entered after the motion of defendant, Norfolk Dredging Company, Inc., to set aside the verdict or to grant a new trial had been denied. On this appeal only two questions are presented: (1) Whether the trial judge erred in ruling, as a matter of law, that plaintiff was a member of a crew of a vessel; and (2) whether the verdict is excessive.

The uncontradicted and undisputed evidence disclosed that at the time of the accident the dredge "Talcott," owned by the defendant, was engaged in dredging operations in navigable waters in Oregon Inlet off Manteo, North Carolina. The dredge and its auxiliary vessels, including a derrick barge, an equipment barge, a tug and other vessels of the flotilla, had arrived in the area from Norfolk, Virginia, the day before the accident. The "Talcott" was equipped with sleeping accommodations for those aboard, the men ate their meals thereon and otherwise lived there when they were not working.

For ten or twelve years plaintiff had been employed by

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[1] 46 U.S.C. § 688 in pertinent part is as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *."

the defendant on various vessels. He started as a deck hand and was promoted to a deck foreman or "deck captain." He had been employed on the "Talcott" as a deck

captain for two or three years prior to the accident. On September 3, 1957, while working on one of the auxiliary vessels, a derrick barge, plaintiff was seriously injured when a 1500-pound anchor fell and landed across his legs.

Any question as to whether the "Talcott" was a *vessel* was removed from the case by the admission of defense counsel at the bar of the court. Therefore, the first primary inquiry is whether plaintiff was, at the time of the injury, a seaman and a member of the crew of the "Talcott' and so entitled to maintain his action under the Jones Act, or whether he was a harbor worker whose exclusive remedy was under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.), hereinafter referred to as the Compensation Act.

Plaintiff's status as a maritime worker is clear and were it not for the Compensation Act, his right to a Jones Act remedy would not be open to question. The Compensation Act covers injuries "occurring upon the navigable waters of the United States" but excludes from its coverage a "member of a crew of any vessel" (33 U.S.C. § 903 (a) (1)). Thus the focal point of inquiry is whether the plaintiff falls within this excluded class.

During the period from September 3, 1957, the date of the accident, to April of 1959, when plaintiff was able to return to work, all of his medical expenses were caused to be paid by defendant, and the maximum compensation benefits provided by the Compensation Act were paid to him. After working nearly two years as a deck captain following his return to work in April 1959, plaintiff brought this action and defendant moved to dismiss on the ground that plaintiff was not a seaman and that he had elected to receive benefits under the Compensation Act to

the exclusion of the Jones Act. In an opinion reported in 194 F. Supp. 484, the District Court rejected this contention but expressly withheld any determination as to whether plaintiff was a seaman or harbor worker, reserving that for the jury. At the conclusion of the evidence and at the insistence of plaintiff's counsel, the trial court instructed the jury, as a matter of law, that the dredge was a vessel and plaintiff was a seaman member of its crew. It appears possible, however, from certain portions of the record that the court was not entirely free from doubt as to the correctness of its ruling which was based upon his conclusion that "there is just no material point of fact that is in dispute" and "it appears to me that these uncontroverted facts now resolve themselves into a question of law."

Was PLAINTIFF'S Status as a "MEMBER Of A Crew" A Question for Jury Determination?

On the first question the dredging company contends that although the facts which disclose the nature of plaintiff's duties at the time of the injury are undisputed, the ultimate determination as to whether Lawrence was a "member of the crew of a vessel" should have been left to the jury on the theory that the inferences which could properly be drawn from established facts are such that reasonable men could differ.

During the entire course of his employment by defendant, plaintiff was working mainly with the deck department on various vessels. His duties as "deck captain" consisted primarily of handling and maintaining in proper condition the earth conveying pipelines used by the dredge to move earth from the bottom of the harbor to the shore line which is the primary function of such a vessel. His duties also included tending the lines of the dredge and

its various auxiliary vessels and the posting of necessary lights. He slept and ate aboard the dredge, sometimes remaining aboard for four to six weeks at a time, although when he was not on watch or engaged in actual work, he was perfectly free to go and come as he pleased.

In urging that plaintiff's employment status could reasonably have been factually determined to have been that of an ordinary "laborer" rather than a member of the crew of the vessel, the defendant employer points to the following facts: Plaintiff was paid on an hourly basis; after working hours he could go and come as he pleased; he did not go to seamen's school and did not have seamen's papers; his primary duty was to handle and care for the conveying pipelines; the dredge to which he was attached had no motive power, no wheel, no rudder, no running lights, never ventured into the ocean and was operated without the maintenance of a log; in connection with his work he sometimes assisted in building up land areas for highways and other construction, assisted in maintaining levees, spillways and pontoon lines; and, when he ate and slept aboard the dredge, there was deducted from his wages the sum of one dollar a day for his food and for the use of towels and sheets.

The company relies most heavily upon the doctrine, announced by two important Supreme Court decisions, that the determination of the status of an employee as a member of a crew or otherwise turns on questions of fact and that even though the facts pertaining to the determination are undisputed, the interpretation of the facts is normally the province of the trier of the facts. *Senko* v. *La Crosse Dredging Corp.*, 352 U. S. 370 (1957); *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 (1940). In the *Senko* decision the doctrine of *Bassett* was